

1 Joseph S. May SBN 245924  
LAW OFFICE OF JOSEPH S. MAY  
2 22 Battery Street, Suite 810  
San Francisco, CA 94111  
3 Telephone (415) 781-3333  
Facsimile (415) 398-1410  
4 joseph@josephmaylaw.com

5 Attorney for Plaintiff  
AMJAD ABUDIAB  
6  
7  
8

9 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 AMJAD ABUDIAB,

12 Plaintiff,

13 v.

14 CITY AND COUNTY OF SAN  
FRANCISCO; ELIAS GEORGOPOULOS;  
15 ANTONIO PARRA; and DOES 1-20,  
inclusive.

16 Defendants.  
17  
18  
19

CASE NO.: C09-01778-JSW

**PLAINTIFF'S REPLY TO  
DEFENDANT'S OPPOSITION TO  
MOTION TO CERTIFY AS FRIVOLOUS  
DEFENDANT ELIAS  
GEORGOPOULOS'S UNTIMELY  
NOTICE OF APPEAL OF ORDER ON  
DEFENDANTS' SECOND MOTION FOR  
SUMMARY JUDGMENT**

Date: March 30, 2012  
Time: 9:00 a.m.  
Place: Courtroom 11, 19<sup>th</sup> Floor

Action Filed: March 27, 2009  
Trial Date: July 9, 2012

20 Plaintiff Rogelio Hechavarria submits the following reply to Defendant's opposition to  
21 Plaintiff's motion to certify Defendant's appeal as frivolous.

22 Defendant's appeal is of the Court's order on the parties' motions for reconsideration, not  
23 from the June 20, 2011 order on the Defendants' second motion for summary judgment. There  
24 were no appealable issues in the Court's order on the parties' motions for reconsideration, and  
25 therefore the Defendant's appeal of that order will ultimately be dismissed. To be sure, the Ninth  
26 Circuit has already ordered Defendant to move for voluntary dismissal of his appeal or show  
27 cause why it should not be dismissed for lack of jurisdiction. *See* Exhibit A (Judicial Notice  
28 Requested).

**ARGUMENT**

Defendant Elias Georgopoulos filed a notice of appeal on December 13, 2011 “from an order, issued in this action on the 8th day of December 2011 . . .” (Dkt. No. 175.) The order issued in this action on December 8, 2011 was the Court’s order granting in part and denying in part the parties’ motions for reconsideration of the Court’s June 20, 2011 order on the Defendants’ third motion for summary judgment. Defendant mistakenly asserts, however, in his opposition, that he “filed its [sic] notice of appeal of the denial of qualified immunity on December 13, 2011. (Dkt. 181, at 1:24-25.)

Defendant concedes in his notice of appeal and his opposition that his motion for reconsideration should be treated as a motion made under FRCP 60 for relief from judgment. (Dkt. No. 175, 2:17-19; Dkt. No. 181:23-26.) “An appeal from the denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment.” *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991), citing *Molloy v. Wilson*, 878 F.2d 313, 315 (9th Cir. 1989). The order from which Defendant has appealed grants Defendant’s motion for reconsideration and denies Plaintiff’s motion for reconsideration on two grounds, and grants Plaintiff’s motion for reconsideration as to the *Monell* claim that the Court erroneously dismissed, which issue was not contested by Defendants. Therefore, there was nothing contained in the order on the motions for reconsideration that Defendant could even appeal, let alone appeal successfully. Moreover, the Court’s order on the motions for reconsideration was not a final judgment, nor was it otherwise immediately appealable as it did not deny Defendant qualified immunity. This is precisely why the Ninth Circuit has *sua sponte* demanded that Defendant dismiss his appeal or show cause.

Defendant contends that *Shapiro v. Paradise Valley Unified School District No. 69*, 374 F.3d 857 (9th Cir. 2004) is controlling and that Plaintiff has tried to mislead the Court by not addressing it. In *Shapiro*, an order determining that the Shapiros were the prevailing parties was filed August 7, 2002. 374 F.3d at 862. The Shapiros filed a motion for partial reconsideration on August 12, 2002. *Id.* at 862-63. The order granting the motion for reconsideration was filed on

1 September 3, 2002. *Id.* at 863. The Shapiros filed a notice of appeal on September 5, 2002,  
2 “stating that they were appealing the August 7, 2002, [underlying] order.” *Id.* Unlike the  
3 Shapiros, Defendant has filed a notice of appeal of the order on the motion for reconsideration,  
4 not the underlying order. Because this was not an appealable order, it will likely be dismissed by  
5 the appellate court.

6 For these reasons, and all the reasons set forth in Plaintiff’s moving papers, the Court  
7 should certify Defendant’s appeal as frivolous and allow this case to proceed to trial as currently  
8 scheduled.

9 DATED: January 17, 2012

LAW OFFICE OF JOSEPH S. MAY

11 /s/ Joseph S. May

12 JOSEPH S. MAY, Attorney for Plaintiff  
13 AMJAD ABUDIAB